IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, NORTHERN DIVISION

IN RE INTEREST OF I.F., a minor child; SHERRIE AND MICHAEL FAZZIO, Plaintiffs, vs. THE STANDARD EXAMINER, SANDUSKY NEWSPAPER INC., WEBER COUNTY, ACUCOM CORPORATION, AKA RECORDS FINDER, Defendants,	)	Case No: 1:17-CV-0132

BEFORE THE HONORABLE ROBERT J. SHELBY

May 29, 2018

MOTION HEARING

Reported by:
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SALT LAKE CITY, UTAH, TUESDAY, MAY 29, 2018

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THE COURT: All right. Good afternoon. Of course, everyone. We'll call Case Number 1-17-CV-132. This is our Fazzio vs. Standard Examiner and others hearing. Ryan Jackson is here in behalf of the plaintiffs. And Andrew Hopkins for Weber County?

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MR. HOPKINS: Yes.

THE COURT: I think we have Ronald Green on the phone.

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Mr. Green, remind me who you represent. You're just listening today, I think.

MR. GREEN: That is correct, Your Honor. I represent Acucom.

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THE COURT: Acucom. That's right. Thank you.

Mr. Dryer, you're here, but I don't think you're planning on entering an appearance today.

MR. DRYER: That's correct, Your Honor.

THE COURT: Okay. Well, welcome to all of you.

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This is going to be a roundabout way to get to this point in just a moment. When I took the bench I thought it was -- my belief is this courtroom belongs to the litigants who are in front of us. And I've long believed that before somebody risks losing a claim or a defense or a case they have a right to be here in the courtroom, and what I hope is to

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observe a judicial proceeding with a judge who's well prepared, who's taken the material seriously, who's unbiased and impartial and committed to applying the rule of law fairly and evenly. And so we had hearings always as a matter of course on motions to dismiss because claims were always at issue and could be lost.

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At some point I realized that that created an artificialness to some hearings because often times in a 12(b)(6) motion I've read the complaint, and the words of the complaint don't change, and if we're in general agreement about the law that applies I ought to know before I get here whether I think the claim is adequately pled or not and why. And so sometimes we would come here and have awkward argument where it appeared I clearly had my mind made up, and, in fact, I did and so the argument wasn't helpful.

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So we don't always have hearings always anymore on motions to dismiss. There's often times still things to talk about, and so sometimes it's helpful. We have things to talk about today, but not really Weber County's motion for this reason.

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It is clear to me, Mr. Jackson, that the amended complaint does not adequately state a claim against Weber County for a lot of reasons. And I have an oral ruling prepared that I'll provide to you at the conclusion of this hearing that I hope will provide a clear explanation about why

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I think it's insufficient.

But what I wanted to talk -- I did think we needed to talk today, and I want to talk about a couple things. More than anything what I really hope we can all do is get on the same page moving forward in this case. So let me begin with the opposition to Weber County's motion to dismiss.

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Mr. Jackson, lest this begin to fill like piling on or picking on you let me just express at the beginning of this discussion, I have two purposes in mind for this discussion. One is to try to aid us as we move forward, to try to streamline what's in front of us; and second is to try to just out of respect for you and out of feeling of obligation to be just really candid I think your -- I'm just guessing by your bar number you don't have a lot of years of experience as a lawyer, but I don't know that. Maybe you practiced elsewhere before you came here. So the things that I'm about to say to you are not intended to -- they are not threats, they're not intended to intimidate you or harass you or scare you or anything else. But I do want to educate you about my experience with this case as a judge because I'm neutral. I don't have a stake in the outcome in a case. And I don't know you. I've had a couple cases with you. And, of course, we had argument, was it last week or the week before in a case? I have no judgment about you, except I want to explain that as somebody who doesn't have a stake in the outcome of this case

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it was quite surprising to read your opposition to Weber County's motion. Mindful that you're an officer of the Court and you have an obligation of candor to the Court I was stunned, candidly, reading how many times in your opposition you asserted that the plaintiffs have pleaded claims for violations of the Fourth, Fifth, Sixth, 10th and 14th Amendments. Those words don't appear in the amended complaint, also a claim under the Family Federal Educational Rights and Privacy Act.

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The words 10th Amendment appear one time. The words 14th Amendment appear one time in the complaint. There is no mention in the complaint of the Fourth Amendment, Fifth Amendment, Sixth Amendment or the Family Federal Educational Rights and Privacy Act. It is either -- at best it is misleading to say that those claims are asserted in the complaint and at worse it's just untrue.

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I don't think you were trying to deceive me because I've read the complaint, and I know what the complaint says. And I've read your opposition, and I see where argue that claims under those amendments should be inferred based on facts contained in the amended complaint. And there's a long passage here in your brief that begins at Page 18 and goes on to Page -- I guess it's through Page 21 where you recite statements from the complaint and then you indicate after each that you believe that that statement infers a cause of action

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based on one of the constitutional amendments. I don't share that view, and maybe you and I just have a disagreement or a misunderstanding about what it means to infer a claim.

I don't know how to make sense of some of it, candidly. For example, and this is slightly unfair because I'm pulling statements now in isolation out of your paper, and I'm not reading them in context with your other statements. But here's a sentence that's on Page 21 of your memorandum in opposition. It's just an example. You recite a short sentence, quote:

For violating his right to privacy as a minor child, end quote. And then in parens, you seem to say that that sentence infers a violation of the right to privacy under the Fourth and Fifth Amendments as well as under the 10th Amendment, the 14th Amendment and the Federal Family Educational and Privacy Rights Act. I can't in any way read that statement as suggesting that to me or to anyone else on the plain language of the words in the amended complaint.

If it was your view that you meant to assert claims under the Fourth and Fifth and Sixth and 10th and 14th Amendments then one thing you might have done when you received Weber County's motion to dismiss is you might have said, oh, my goodness, if that was unclear just allow me an opportunity to amend. I'll be clear about it.

That's not what you said. Instead you said that

those claims were there, even though they're nowhere mentioned, and that's a problem.

Some of these claims I think are barred by law, which is another potential problem, and it's not necessarily a problem right now today. I want to be clear about this. And I'm about to transition into a discussion about Rule 11 not for the reason of telling you that I'm going to impose any Rule 11 sanctions, though one of the defendants in the case already asked for sanctions and I denied that motion without a hearing.

Remember that Rule 11, and I'm painting with broad strokes now. I'm not reading directly from the rule. Rule 11 ensures that when a lawyer signs a pleading that there's a legal and factual basis for the relief and the theory that's asserted or at a minimum upon discovery there would be factual support for the facts; or, and/or that there's a good faith argument for an expansion of the law.

I'm just only going to pick, let's pick two of the proposed amendments that you say in your opposition give rise to a 1983 claim. One is the 10th Amendment. And I will tell you I didn't go surveying the legal landscape to figure out whether any cases ever said that the 10th Amendment gives rise to a private right of action or constitutional rights for individuals. The 10th Amendment, of course, as Weber County points out in its reply memorandum is designed to give the

States independence from the federal government. It would be a surprise to me if there is any legal basis for asserting that an individual citizen has a 10th Amendment claim against a state or a 10th Amendment right that a state can violate. Maybe, maybe there's a good faith legal argument for it. I'm not aware of any.

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And it may be that the County just misconstrues the nature of your Sixth Amendment claim, and maybe I do, also. It's unclear to me that there would be any basis to assert a Sixth Amendment claim against Weber County here because it's the state that charges juveniles, not the county. So even if they were -- even if the minor in this case was charged in a wrong jurisdiction, which I don't think is the case, that wouldn't be a claim as a matter of law that could be asserted against the county. There would be no legal basis for that theory. And Rule 11 requires that you have engaged in reasonable inquiry to satisfy yourself that you can assert these claims based on the facts that you advance. All of that is by way of talking about a potential amendment in the case.

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This is the first time we've seen each other in this case. This is the first time a court has weighed in on the viability of these claims and theories, and so I have little doubt in my mind that the plaintiff should be afforded an opportunity to amend their complaint if they want. So we're not dismissing the claims with prejudice today. To the

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contrary, I'm dismissing the claims without prejudice so that they have an opportunity to amend.

What I do want to say is this. Did I already mention attorney's fees?

13:46:38 MR. HOPKINS: No.

THE COURT: The County asks for costs and attorney's fees in its motion. We're not granting costs or attorney's fees today. If we find ourselves back here again, and it's not clear -- and let me step back for a moment.

13:46:56 Some of the other defendants have also filed motions that raise issues about the sufficiency of the claims with respect to those defendants. I'll tell you in complete candor, I haven't read a word of any of those papers. I need to talk about why, and I will in a moment. And I haven't read

13:47:17 your response, and I haven't gone to look at the complaint and try and figure out whether it's susceptible to attack for the reasons stated in those papers. But this brings me all back to this point.

I'm going to allow you to file an amended complaint

13:47:29 if you wish. You don't have to, but you're welcome to. You and I will talk about a reasonable time period for putting that together and filing it. It can't be filed here unless there's a federal claim in support of that complaint. You might just choose to re-file in state court on the state law

13:47:48 claims or you might choose to amend your 1983 claim and

re-file it here along with the state claims over which we have supplemental jurisdiction.

Whatever you choose to do, if we're back here again and we're testing the viability of this complaint and your 1983 claim again fails for the reasons, especially if it's on the basis of any of the arguments that Weber County has already put forward in its papers, which I think are nearly completely legally right, and the law I think that the county set forward is a correct statement of the law, or if we're here on a new round of motions to dismiss by the other defendants drawn to the amended complaint, if, for example, one of them has identified a clear legal defect in the pleading or the cause of action asserted against one of them and you reassert that and there is no basis in law, then we begin to have a Rule 11 problem or an attorney's fees issue that I would very much like for us not to have to reach.

Let me stress again, please, I'm not -- that's not a threat. I'm just trying to give you fair notice so that we make sure that when you go back to the drawing board, if you do, you study very carefully the arguments and the authorities that the defendants have already provided all of us, and you can disagree with their arguments. So you don't have to assume that they're right. You don't have to change your claims because one of them says it's incorrect. You won't know until we meet. But if it's clear that the law prohibits

or bars or claim for reasons that they've articulated and you might know that had you just read a case that they cited and you don't read it, then we're having a different conversation.

Now let me explain why we're here having this conversation here today on Weber County's motion. The 10th Circuit has been very clear I think in its guidance to trial courts in this circuit that where state law claims and federal claims are here together that I'm required to scrutinize the federal basis for jurisdiction. And if the federal claim or claims that provide the basis for jurisdiction fail, then I'm ordinarily told I should send the state law claims back to state court because the state courts have an interest in developing and deciding their own law, not that we can't and we do when we're here on supplemental jurisdiction, but if your 1983 claim fails and we're only left with state law claims I won't reach the merits of those claims. We'll instead direct the complaint to state court.

And I can't now remember, I think you filed in federal court in the first action, so I think I would dismiss because there's nothing to remand and there would be a dismissal without prejudice. So that's why we're starting today with the Weber County motion because it's the only one that implicates federal jurisdiction.

I will say there are -- you also make in your complaint a passing reference to diversity jurisdiction under

1332, and it's insufficiently pled to provide any way for the Court to evaluate whether there is separately diverse jurisdiction. Nobody has raised that issue, though the 10th Circuit has told me I'm required to raise it on my own. So I'll just point out that if I was just -- if the 1983 claim were dismissed today with prejudice I would conclude that the complaint lacks the factual allegations necessary to provide a basis for diversity jurisdiction, and I would dismiss the complaint. So if you choose to amend you might also think about whether you are, in fact, seeking to assert diversity jurisdiction. And if so on what basis. And then there's a good case from the 10th Circuit, let me think for a minute what it's called. The name escapes me right now. But if you look you'll find some good case law from the 10th Circuit in the last year or two describing the kinds of factual allegations that are required to support a claim of diversity jurisdiction.

Mr. Jackson, before I give an oral ruling, do you have any questions about what we've just talked about or do you wish to provide any thoughts or feedback about it? It's not a happy message to get at the beginning of a hearing.

MR. JACKSON: I appreciate it, though, Your Honor. And I guess -- from the complaint I guess just to back my assertions and what we put in the complaint, and I think in there we noted the guidance from this court in regards to

filing a 1983 action where the specific citing of the amendment isn't necessary. But I understand how this can be confusing because in our response we put a bunch of inferences in there from one claim in trying to rebut it instead of saying, well, this is -- this is just -- this is the Constitution that we're talking about, not just trying to throw everything under the sun.

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So I understand that, Your Honor. And so that's kind of the mindset the complaint was prepared going into it with noting the violations and the language, but not specifically citing constitutional violations. But -- and again, I understand that it probably would have been easier instead of trying to be prideful and back what I put to just amend the complaint. But I appreciate the Court's willingness to allow us to amend and re-file and whatnot.

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I guess one question I have in regards to the response, and I don't know if the Court is willing to go into this, is it specifically based on the failure to state a claim or are there other issues? Because I know there's a specific issue as to -- I was kind of prepared going into this as to whether or not the dissemination of juvenile protective information is a constitutionally protected interest. I don't know if the Court went there or not.

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THE COURT: Before you and I have that discussion, why don't I read my ruling, and I think it will explain the

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basis for my ruling. I do want to just say, let me just briefly address the issue that you raised first, though.

I said that I think the County has correctly stated the law on at least -- and that's true I believe as to the points the County addressed. I will say I didn't do any 1983 litigation as a lawyer before I came to the court, and I've been surprised at how complex it is and how nuanced. It is a difficult minefield for a plaintiff, any plaintiff to navigate, I mean, it is really a challenging work, and the different theories that have to be advanced against different kinds of defendants. And then we haven't yet begun to talk about qualified immunity.

Part of the reason that I think -- let me first say, I think that the County has correctly stated the case law, the standard that I'm required to apply in evaluating the sufficiency of the pleading in this context. The 10th Circuit has said this. This is in the ruling I'll read in a minute, but it's the Robbins vs. Oklahoma decision from the 10th Circuit that very unambiguously tells us:

Whatever Rule 8 requires, whatever Rule 12 requires we know that if you're asserting a Section 1983 claim, quote, a plaintiff must allege facts sufficient to show assuming they're true that the defendant plausibly violated his or her constitutional rights and that those rights were clearly established at the time. This is the 10th Circuit speaking

again. This requires enough allegations to give, I would say, each defendant notice of the theory under which his or her claim is made.

I think that's the legal standard, and that's what I'll be reviewing -- that's the lens through which I'll be reviewing an amendment if one is forthcoming. And the reason that is going to be helpful to all of us including you is, and I'm not coaching anybody, I'm not saying anything that anybody in this courtroom doesn't know, the next motion that usually comes is the qualified immunity motion. And we won't be able to go engage in that exercise if the claims and theory supporting the claims aren't adequately alleged in the complaint itself. So that could prevent a hurdle for all of us. I just advise you of that at the outset.

Let me read my ruling, and then I'll answer any of the questions you have, mindful that I'm not permitted to coach parties, but I do think we should make use of our time here to give you sense for what at least this judge, how I'm viewing things so that you can try and work around that or go somewhere else if you don't like me.

So all right. Here's the ruling. You don't need to keep detailed notes. We'll enter a minute entry in the next few days referencing this portion of the transcript as the Court's ruling and the basis for the Court's ruling.

So before the Court today is Weber County's motion

to dismiss. It's filed at Docket 16. Just briefly by way of background, IF is a minor, and he was charged through the Weber County Juvenile Center on charges involving a controlled substance, possession of a dangerous weapon by a minor and theft. Because IF was a minor his court proceedings were not open to the public. And as part of the resolution of that case in Weber County IF was ordered to get his fingerprints taken.

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On April 10th -- I should have said at the outset these facts are drawn from the complaint. There's no factual record before us, but these are the allegations in the complaint which are assumed to be true for purposes of our hearing today.

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On April 10th of last year IF and his mother went to the Weber County Adult Detention Center for fingerprinting. The Weber County Sheriff's Office then published IF's mugshot and information about the charges against IF, all of that published on its website. And that information was then disseminated to news sources, some of whom are defendants in this case on theories that they unlawfully rebroadcast that information.

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The Fazzios then filed this complaint and later amended the complaint alleging that the publication of IF's mugshot and charging information caused emotional and reputational damage for both IF and his parents.

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I'm going to pause right there for just a moment because we didn't talk about this in our earlier conversation. But this is an important thing to keep in mind if there's a further amendment and we're back reviewing the sufficiency of a claim.

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In this context, in the 1983 context, it will be important if not essential that each claim identify which claimant is asserting the claim and on what theory or basis because there may be different theories or bases that would be available to some plaintiffs and not others and against which defendant for the same reason. That's going to be an integral part of any viable 1983 claim here.

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So returning to this case and this ruling at issue today are the Fazzios' claims against Weber County, first alleging a violation of IF's civil rights under Section 1983; and then also claims for defamation; publication of information in a false light; public disclosure of embarrassing private facts; intentional infliction of emotional distress; and breach of fiduciary duty.

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And I'll pause again for a minute about some procedural history. The Fazzios amended their complaint after Weber County filed its motion to dismiss. But I observe that the amended complaint added only Acucom as a defendant and did not change any of the allegations against Weber County. Weber County asks in its reply that we redirect the motion to

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dismiss toward the amended complaint, and I think that's appropriate here. There's no unfair notice. The result would be the same, and so that's how I'm construing the motion.

So turning next, then, to the legal standards that I'm required to apply today, Rule 12(b)(6) of the Federal Rules of Civil Procedure requires a plaintiff to state a claim upon which relief can be granted. And to do so a complaint must allege sufficient facts to make the claims for relief plausible on their face. And, of course, that's familiar language from Iqbal and Twombly.

And Rule 8 requires enough specificity in a complaint to inform the defendants of the actual grounds of the claims against them. I'm reading there from Robbins vs. Oklahoma in the 10th Circuit, 2008. And as we all know, in reviewing a motion to dismiss I'm required to accept the well-pleaded allegations of the complaint as true and to construe those allegations in the light most favorable to the plaintiff. I cite for support Cressman vs. Thompson from the 10th Circuit, 2013.

However, I'm told I need not accept the complaint's legal conclusions nor threadbear recitals of the elements of a cause of action supported by mere conclusory statements. Of course, that's language from the Iqbal decision in 2009 from the Supreme Court. So in light of those legal standards, we'll evaluate the claims here.

The amended complaint contains as I've said earlier only one federal claim. That is an alleged violation of 42 United States Code Section 1983. Because subject matter jurisdiction over this entire lawsuit is predicated on the survival of the Section 1983 claim that's where we'll begin.

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A plaintiff who claims a Civil Rights violation under Section 1938 must allege a person acting under color of state law has deprived the plaintiff of a right secured by the US Constitution or federal law. I'm citing here the statute itself, Section 1983. To establish Section 1983 liability for a municipality such as Weber County a plaintiff must show, one, the existence of a municipal custom or policy; and number two, a direct causal link between the custom or policy and the violation alleged. That's quote from Jenkins vs. Wood from the 10th Circuit 1996.

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I'm going to pause here again for a moment to visit about allegations in the complaint in Rule 11 for just a moment. One of the allegations in the amended complaint as I recall, Mr. Jackson, is that the County had a policy -- I want to find the language. It was important language.

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MR. HOPKINS: Paragraph 29, I believe, Your Honor.

THE COURT: Well, that's the opening paragraph.

MR. HOPKINS: Yeah.

THE COURT: Isn't there another one where it's alleged that the policy is to disseminate juvenile

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information?

MR. HOPKINS: That's what 29 says.

THE COURT: I think I was also -- I think I was thinking of the second paragraph, 37. That's something else we should devote our attention to in another amendment. Let's make sure that we don't have duplications of the paragraph numbers. There were two paragraphs numbered 37 in different places in the complaint. The second one says: For having a procedure or policy in place whether through administrative rules or implementation of software and programs that disseminate statutory, protected and judicially protected juvenile information into the public domain regarding a juvenile civil proceeding brought against them.

I'm not sure what that means, but I read that to mean that you think that the County has a policy of disseminating private information about juvenile minors and their cases. And I think that's not an allegation that appears to be pled on information and belief. And I will be surprised if there's a factual basis for an allegation like that. In fact, I think your complaint rests on -- I think your complaint rests on a theory that the policy is not to do that, but you did it, anyway, and that was unlawful. But I'll leave it to you to decide what your theories are.

I just want to ensure that we have -- that we're mindful of our Rule 11 allegations not only with respect to

the legal theories and whether they're viable, but whether the facts are supported or would be supported after a reasonable opportunity for discovery.

All right. Returning now again -- I'm sorry to be jumping in and out, returning to my ruling and the basis for that ruling. In their amended complaint the Fazzios allege Weber County had, quote, a procedure or policy in place that disseminates statutory protected and judicially protected juvenile information into the public domain regarding a juvenile proceeding brought against them. That's Paragraph 37.

And the Fazzios allege that policy, quote, violated the rights, privileges and immunities via secured by the state and Federal Constitution and laws. That's Paragraph 38.

However, it's unclear what rights the Fazzios argue were violated. The amended complaint specifically mentions only one constitutional right and maybe two. I'm not sure. The 10th Amendment is referenced, but not in -- I think in Paragraph 4, not in the part of the complaint that talks about the theories or claims.

The one constitutional right that is mentioned is the 14th Amendment. And the Fazzios argue the 14th Amendment protects IF's parents', quote, right to the raising and rearing of the minor child without state intervention, end quote. And then the Fazzios allege that Weber County violated

that right. That's in Paragraph 48.

The amended complaint also alleges IF has, quote, due process rights to have the State bring or declare to bring criminal charges to the public against IF through the constitutional and criminal procedures set forth under Utah and federal law, end quote; and then goes on to say that, Weber County violated IF's right to privacy as a minor child. Those allegations are set forth in Paragraphs 51 and 53 of the amended complaint. And I'll take up all of those then in turn starting with parental rights.

The Fazzios allege Weber County violated their rights under the 14th Amendment which protects parents' right, quote, to make decisions concerning the care, custody and control of their children, end quote. That's from the Supreme Court Troxel vs. Granville in 2000. The Fazzios have not alleged any facts relating to Weber County's interference with the care, custody and control of IF. The Fazzios argue Weber County, quote, unilaterally and unlawfully, end quote, made the decision for the Fazzios whether to release information about the case to the public. That's in the opposition memorandum filed by the Fazzios at Page 22. But I'll observe that the Fazzios have presented no legal or factual authority for the proposition that a governmental entity's decision to release juvenile arrest records implicates a protected parental right. And for that reason I

preclude that that claim is not adequately pled.

Turning to due process. The Fazzios' clearest allegation of a due process violation is that IF has, quote, due process rights to have the state bring or declare to bring criminal charges to the public against IF through the constitutional and criminal procedures set forth under Utah and federal law. That's Paragraph 51 again of the amended complaint.

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However, that allegation appears to be one viable only against the state which is the entity that brings criminal charges against juveniles in the state of Utah, not the County. And for that reason, it fails to adequately state a claim against Weber County.

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The complaint also appears to allege a due process violation stemming from reputational harm. The Fazzios allege Weber County first -- excuse me -- Weber County published false information about IF which deprived IF of liberty and property interests related to his reputation. That's Paragraph 49.

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It is true that reputational harm when combined with an injury to a right or status established by state law may be vindicated for the due process clause of the 14th Amendment, so said the 10th Circuit in Doe vs. Bagan in 1994. However, it is unclear from the complaint at least on what grounds the Fazzios are pursuing this claim because they

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have not alleged that IF experienced an altered status as a matter of state law.

Additionally in the Fazzios' opposition to motion to dismiss they characterized this allegation as implicating not just the Fifth and 14th Amendments but also the Fourth Amendment which does not provide grounds for a due process claim concerning reputational harm or damage. That discussion was set forth on Pages 19 and 20 of the opposition brief.

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Given the lack of clarity about the grounds on which the claim rests the Court concludes this claim does not satisfy Rule 8's notice requirement that the complaint informed the defendants of the actual grounds of the claim against them. And I cite for additional support again the Robbins vs. Oklahoma decision. And for those reasons I conclude that a due process claim is not adequately pled.

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Turning next to the right to privacy. Weber County also argues the Fazzios have failed to state a claim for a violation of a right to privacy. And in their opposition to the motion to dismiss the Fazzios state they do not allege a right to privacy and disclosure of arrest records, judicial proceedings and police reports. This is Note 4, Page 29 of the opposition memorandum. Instead the Fazzios assert that they are alleging the right to privacy from state action without a finding of probable cause on the charges that were posted. That's also on Page 29 of the opposition memorandum.

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But the Fazzios have presented no argument why Weber County which did not arrest or charge IF was required to have probable cause to post the charges. And for that reason, allegations of a right to privacy on that basis fail to state a valid claim.

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I observed that in their opposition to their motion to dismiss the Fazzios argue that their amended complaint also advances claims for violations of the Fourth, Fifth, Sixth and 10th Amendments as well as the Federal Family Educational Rights and Privacy Act. However, none of these allegations are sufficiently pleaded in the amended complaint. And, in fact, as I've already said the amended complaint never even mentions the Fourth, Fifth or Sixth Amendment. It mentions the 10th Amendment only in passing when we're describing Weber County as a party in the case and makes no reference at all about the Federal Family Educational Rights and Privacy Act.

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Weber County is not required to guess which constitutional or federal violations the Fazzios' theories are reliant upon. Because these claims do not meet Rule 8's notice requirement they have to fail at this stage of the proceeding.

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Just briefly with respect to the state law claims. The remaining claims asserted against Weber County are all state law claims. These claims are here in federal court only

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because the Court can exercise supplemental jurisdiction over state law claims that share a common nucleus of operative facts with federal claims that are already here. I cite for support Estate of Harshman vs. Jackson Hole Mountain Resort Company from the 10th Circuit in 2004. But the exercise of supplemental jurisdiction is discretionary. And as I said at the outset the 10th Circuit has informed me and instructed the trial courts rather in the circuit that when all federal claims have been dismissed the Court may and usually should decline to exercise jurisdiction over any remaining state law claims. I'm citing there Smith vs. City of Enid, 1998.

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By having concluded that no federal claim survives, at this stage I decline to exercise supplemental jurisdiction over the state law claims because notions of comity and federalism demand that the state court try its own lawsuits absent compelling reasons to the contrary. That's a quote from Brooks vs. Gaenzle, 10th Circuit, 2010. So the state law claims asserted against the County are also dismissed without prejudice.

In conclusion, Weber County's motion to dismiss is granted. That's Docket Number 16. The Fazzios' amended complaint is dismissed without prejudice. The Fazzios may file -- well, let's talk about what you might file. And let's take a minute and take up the claims against the nongovernmental defendants, also.

What I came to the bench thinking we should do after our discussion today, Mr. Jackson, is just dismiss the entire complaint without prejudice, not just the claims against the County in view of the fact that there likely would either be an amendment or dismissal of the complaint because there's no longer a 1983 claim, and if there was an amendment I was guessing that you would want an opportunity to address some of the arguments made by the defendants in their motion to dismiss. So I had in mind just granting you leave -- dismissing, the entire complaint and granting you leave to file an amended complaint when it is that you wish to do so.

And let me just further say, under the local rules and ordinarily it's my practice that instead of filing an amended complaint we have a motion for leave to file an amended complaint. That just I think expedites briefing on the viability of the claims, and then it gets us where we need to be more quickly here just because we have other defendants who aren't being heard today have already filed motions to dismiss. And I can anticipate that if we're back here in federal court we'll be hearing from everybody again. It seemed to me that maybe the better course here, the more direct path is just to file the amended complaint, and it will take up its viability, and the defendants will either answer or move to dismiss, stating again that there's no requirement that you amend and try to stay here. You may want to go to

state court. It's entirely up to you.

But do you have any views about that before we hear from the County? And if you do want time to think about filing an amended complaint, how much time would you like?

14:17:45 MR. JACKSON: Yes, Your Honor. I think we would want some time. Maybe 30 days might be sufficient. We can kind of look at it with the jurisdictional claims raised and everything here.

THE COURT: That makes sense to me. And it seems

14:17:58 right.

Mr. Hopkins, you must be exhausted from all the argument you've had to make today. I can imagine the County would potentially pick a different path than the one that I've outlined. I think this is the one that is most fair and makes

14:18:17 most sense in view of where we are. But your view? Your response?

MR. HOPKINS: Yeah. I wish it would have been with prejudice, but I understand your view. I just don't think they're not going to be able to show invasion of privacy claim

14:18:29 with the facts they have in this case. And so then we'll probably be back here again, but hopefully more on the substance of that issue.

THE COURT: We'll see. I won't prejudge a complaint that we haven't seen yet. It may look different

14:18:42 than the one we have in front of us. If it's going to survive

it needs to look different in some ways, for sure.

So the other defendants who aren't here arguing today may also oppose what I'm doing. But I also don't think it makes sense to have motions to dismiss drawn to a complaint that now is infirm. And so I'm -- I'll probably -- I'm sure what I'll do is deny their motions to dismiss without prejudice to re-file them after the second amended complaint is filed, if there is one. So those arguments can be reasserted in another motion to dismiss or --

14:19:16 MR. HOPKINS: Your Honor, does that go for the motion for summary judgment that has been filed, as well?

THE COURT: It does. I mean, we're going to have new claims in front of us and potentially new theories, and we'll take them all up at that time.

14:19:28 Mr. Dryer, does that change your desire to be heard today?

MR. DRYER: Yes, Your Honor. If I might make a brief inquiry. Thank you for asking if I have any views on this.

14:19:38 THE COURT: Would you kindly just come up to the podium so our court reporter can hear you more clearly? Thank you.

MR. DRYER: Thank you, Your Honor. My inquiry would be, I would presume and it would be helpful I think

14:19:54 perhaps for counsel and the rest of us if the Court could

confirm my presumption that the cautions that you've outlined today about Rule 11 and the pleading requirements of that would also be -- although they were made in the context of the 1983 claims, would it be the Court's view that those cautions potentially would also be applicable to the pleading, any re-pleading involving the other parties on the other claims? And I'm specifically referring to the Court's admonition that the alleged harm that each plaintiff has been alleged must be done with specificity and must be specific as to the multiple defendants, as well.

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THE COURT: So I probably was not as clear and as direct about that as I would like to have been earlier. Thank you, Mr. Dryer.

Let me answer that question this way. Mr. Jackson, the way I've been thinking about it a little bit, not a little bit, quite a bit, actually, I think this general point is well illustrated here. Given how the argument developed, the positions of the parties sort of developed in the course of the briefing on Weber County's motion to dismiss I don't think it would necessarily -- it may or may not be a Rule 11 violation, for example, to assert a 10th Amendment claim as a basis for a Civil Rights action. I have no idea whether there is any legal authority or good faith basis to advance that argument. But let's imagine that had been done in the complaint and then the defendants file a motion to dismiss.

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That cites authority saying there is no basis for that claim. If the plaintiffs then continue to try to advance that claim in view of clear authority saying that there's no such claim, that begins to raise a Rule 11 concern in my mind. It's something that you're required to have researched sufficiently in advance. But it wasn't, for example, in the motion to dismiss with the County until the County's opening breach that we read with about the Fourth, Fifth, Sixth and 10th Amendments in your opposition. And it wasn't until we got the County's reply that I think the plaintiffs were on fair notice that some of those claims are probably not viable.

If some of those claims that are barred by law reappear in an amended complaint, that would begin to raise Rule 11 concerns for me. And that is true not only with respect to the County, but now that you have the benefit of the briefing from the parties similar arguments, if there was -- I'm mindful that we're not all -- we haven't all been doing Civil Rights litigation and First Amendment litigation for our whole career. And for some of us that career is a few years and for others, Mr. Dryer, maybe a few decades, I don't know. But there's room here. Nobody's dropping any hammers today.

But if the defendants have identified controlling authority on a point and the plaintiff continues to advance into the prongs of that authority without a good faith basis

for doing so, then, yes, we'll be talking about attorney's fees or sanctions or Rule 11 issues for any of the parties.

Mr. Dryer, that was a long answer, but I appreciate you raising the question so we're all clear.

14:23:30 MR. DRYER: Thank you, Your Honor. And I appreciate that clarification. My concern is the cost for my client. They've invested considerable time and effort and expense in fully briefing what we believe are dispositive constitutional based defenses that will be applicable

14:23:45 regardless of how the complaint is re-pled. And I certainly don't want to get into the merits at this point. But I'm concerned that they're allowed to replead. They reassert everything. We re-file a new motion. And then the Court determines there is no federal jurisdiction, and then it gets

14:24:03 bumped over to state court and we've got to go through this whole thing again. This has certainly had a chilling impact on the newspaper's reporting on this case and other matters with Weber County.

And so that would be -- I just wanted to have the

14:24:19 Court make it clear to counsel that your admonitions would be applicable on other claims, as well.

THE COURT: Let me add one thing to that, Mr. Dryer, because it was an unstated thought that I had as I thought about this approach. By dismissing the motions filed

14:24:38 by the nongovernment entities without having been heard, I've

reassumed -- excuse me -- I have assumed that if the complaint is not substantially different with respect to the claims against those defendants, they'll just be re-filed, so it shouldn't be expensive to re-tee up those issues. And if there are significant modifications, then really what you've obtained is the benefit of First Amendment in view of some arguments that seem to have had sway.

But where it really comes into play for the plaintiffs, Mr. Jackson, just so we're all on the same page, is very little doubt in my mind that plaintiffs have an opportunity to hear from the other side and then hear from the Court and a chance to try and reshape their claims before they lose those claims on the merits. And the 10th Circuit is quite -- feels quite strongly about that.

But I think having had the benefit of briefing, though you haven't yet heard from the Court on those arguments from the nongovernmental defendants this is one of those instances where it becomes less clear or less certain that there be further amendments offered, and if so how many. We get closer to the end for the reasons that Mr. Dryer articulated. I hope that's not too obtuse. I hope I'm clear about that.

MR. DRYER: Thank you, Your Honor.

THE COURT: Thank you, Mr. Dryer.

And, Mr. Green, you've had the benefit of that

discussion. I know I said I would allow you to appear by phone only if you didn't argue, so don't argue. But do you have any questions you want to add or any questions that you want to pose on behalf of Acucom?

14:26:16 MR. GREEN: Not at the moment, Your Honor. My concerns were similar to those of Mr. Dryer, and you responded to them.

THE COURT: Thank you, Mr. Green.

Mr. Jackson, I'm back to you. What other questions 14:26:24 do you have, or what else should you and I take up while we're here?

MR. JACKSON: I guess at this time we wouldn't raise anything additional further. But I appreciate the Court's time in addressing this matter.

14:26:40 THE COURT: I -- let me add one other thing just briefly, and I want to be clear again, Mr. Jackson. I'm not -- you're a lawyer and an officer of the Court, and so you already know this, of course. But I just observe that something that is not entirely uncommon in this context in the 14:27:13 context of 1983 claims is to associate other counsel sometimes where these claims are complicated and complex and factually specific and legally -- it's a unique and discrete area of practice, for sure. I'm not telling you to do that. I'm just observing that that's not -- it's not uncommon.

14:27:36 Okay. Counsel, thank you for your time and for

your patience today. I appreciate it. We'll stand in recess.

(Whereupon, the court proceedings were concluded.)

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STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, KELLY BROWN HICKEN, do hereby certify that I am a certified court reporter for the State of Utah;

That as such reporter, I attended the hearing of the foregoing matter on May 29, 2018, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the foregoing pages number from 3 through 36 constitute a full, true and correct report of the same.

That I am not of kin to any of the parties and have no interest in the outcome of the matter;

And hereby set my hand and seal, this ____ day of _____ 2007.

_____
KELLY BROWN HICKEN, CSR, RPR, RMR